84-1268

Office - Supreme Court, U.S.
FILED
MAR 8 1985
No. 84-1268
CLERK

In The

Supreme Court of the United States

October Term, 1984

KFC NATIONAL MANAGEMENT COMPANY,

Petitioner,

vs.

MICHAEL L. BROWN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR MICHAEL L. BROWN IN OPPOSITION

ALFRED P. KREMER
Attorney for Respondent
Office and Post Office Address
One Exchange Street, Suite 900
Rochester, New York 14614
Telephone: (716) 546-6040

Daily Record Corporation
Rochester, New York

(11392)

BEST AVAILABLE COPY

9 pp

QUESTION PRESENTED

1.) Since two courts below have found that the remand order was made within the ambit of 28 USC 1447 (C) does this Court have the power to review it despite petitioner's claims that the remand was outside the parameters of the statute?

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Statement	2
Argument	2

TABLE OF AUTHORITIES

	Page
Cases	
Thermtron Products, Inc., vs. Hermansdorfer, 423 US 336, 96 S.Ct. 584, 46 L.Ed. 2d 542 (1976)	3
Volvo Corp. of America vs. Schwarzer, 429 US 1331 97 S.Ct. 284, 50 L.Ed. 2d 273 (1976)	3
Statutes	
28 USC 1254 (1)	1
28 USC 1447 (C)	2, 3

In The

Supreme Court of the United States

October Term, 1984

KFC NATIONAL MANAGEMENT COMPANY,

Petitioner,

vs.

MICHAEL L. BROWN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR MICHAEL L. BROWN IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1A) is unreported. The opinion of the United States District Court (Pet. App. 3A) is unreported.

JURISDICTION

The judgment of the United States Court of Appeals was entered 12/15/84. The jurisdiction of this court is presumably envoked pursuant to 28 USC 1254 (1).

STATEMENT

On January 11, 1984 Michael L. Brown demanded that respondent furnish him copies of his employee's application so that he could determine whether or not a contract had been made between himself and respondent in accordance with New York State Law. That request went unanswered. In May, 1984, Michael L. Brown moved in New York State Supreme Court for pre-complaint discovery (Pet. App. 10A) stating among other things that it would help to resolve the issues much more quickly and perhaps dispose of the matter without formal litigation.

A copy of the application was served upon respondent. Respondent defaulted for want of appearance and the New York State Court order was made and entered and served upon petitioner, all of which it concedes. Petitioner then went to the United States District Court arguing that it was now subject to New York State Court Orders and that this was an initial pleading. The district judge ruled otherwise and remanded whatever there was to remand back to the New York State Supreme Court.

The United States Court of Appeals for the Second Circuit factually decided that the remand order made by the district judge was based upon grounds set out in 28 USC 1447 (C) and decided that as a consequence it could not reach the propriety of the district judge's order.

ARGUMENT

REASONS FOR DENYING THE WRIT

Petitioner concedes, sub silentio, that it has not merely failed but it has refused to obey a lawful state court order which was obtained upon its default after notice. It advances no reason for this procedure.

Petitioner's goal and the real reason why it seeks certiorari, is to permit it to avoid the consequences of an order which by law it must otherwise obey.

With that as its major premise, petitioner occupies this Court's time with arguments ill suited for a state circuit court let alone the United States Supreme Court.

Both the United States District Judge and the United States Circuit Judges found that the remand was clearly based upon grounds set out in 28 USC §1447 (C).

Two courts have made a factual finding that the remand was within the parameters of law provided for this event. At a bare minimum, the very narrow issue which petitioner wants resolved is beyond this court on these grounds alone.

Beyond the two court rule, this court has clearly stated in *Thermtron Products, Inc., vs. Hermansdorfer,* 423 US 336, 96 S.Ct. 584, 46 L.Ed. 2d 542 (1976), and *Volvo Corp. of America vs. Schwarzer,* 429 US 1331, 97 S.Ct. 284, 50 L.Ed. 2d 273 (1976), that Congress has immunized from all forms of appellate review any remand order issued within the ambit of 1447 (C) even if an appellate court might deem it erroneous.

Petitioner, eager for any result better than the one it has now, does not tell this court why it should overturn this recently settled principal.

Petitioner makes no showing that any constitutional right of its has been violated; petitioner makes no showing that there is any conflict in the circuits. By way of justification for its position petitioner argues first that the district judge "dismissed," (pet. p25) the case. Since there was no "pre-existing state court action," there was no place to which petitioner could be sent back. As a consequence petitioner argues that there is a judicial black hole which the more powerful jurisdiction of the United States Court system can be envoked to protect petitioner. This is an incorrect description of what happened.

By definition, there was no initial pleading and no state action. Consequently, there was nothing to be removed and nothing to be remanded. Respondent is left where he was before enforcing

an order granting prepleading discovery. Petitioner is left where it was before in disobedience of a lawful order made by a coordinate jurisdiction.

All of this creates no question of national importance; there is no issue of constitutional magnitude. There is no error for this court to correct. There are no questions of equity or manifest injustice. The writ should be denied.

Respectfully submitted,

ALFRED P. KREMER
Attorney for Respondent
Office and Post Office Address
One Exchange Street, Suite 900
Rochester, New York 14614
Telephone: (716) 546-6040